Supreme Court, U.S.
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No. 90-703

In The

Supreme Court of the United States

October Term, 1990

MARTIN MITCHELL STEVENS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

Petition For Writ Of Certiorari
To Court Of Appeals Of The State Of Oregon

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Embedded within the State's opposition is recognition that petitioner's constitutional concern is substantial. *See, e.g.*, Respondent's Brief in Opposition ("Opp.") at 6 ("Stevens' interest 'in the accuracy and justice of the decision to terminate' his parental rights 'is a commanding one'.") ("The state acknowledges that its pecuniary interest, though legitimate, does not outweigh Stevens' interest in retaining his parental rights"). It argues, however, that review should be denied because Stevens, in fact, suffered no prejudice from any denial of his "right to be seen" (*See* Petition for Writ of Certiorari ("Petition") at 5) – in effect, that the denial constituted "harmless error."[1]

That argument furnishes no ground for refusing Stevens' request for review. While there can be harmless

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[1] The State argues, additionally, that Stevens' petition should be denied in light of the purported *de novo* review of parental termination orders by Oregon appellate courts. *See* Opp. at 3-4. That review, says the state, represents an "independent [state] ground" of decision, making "immaterial" the determination of "whether the trial court proceeding was constitutionally inadequate." Opp. at 4. The argument lacks merit on its face. The State concedes that "[i]n reviewing termination cases, the Oregon Court of Appeals customarily gives due regard to the findings of the trial court. . . . " (Opp. at 4). In fact, as if to underscore why this petition should be *granted*, the State notes that the reason for such deference is precisely "because of the trial court's 'opportunity to observe the witnesses'." *Id.* That, of course, is petitioner's point. *See* Petition, *passim*. Moreover, the argument that *de novo* review constitutes an independent state ground utterly misconceives that doctrine. While state laws may *expand* rights guaranteed by the United States Constitution, they, obviously, cannot obviate the violation of a right guaranteed by the federal Constitution.

constitutional error in some circumstances (*see Chapman v. California*, 386 U.S. 18 (1967)), that principle has no application here. The right which petitioner asserts is the right to have his suitability as a parent judged by an assessment of his fitness that can be made only through personal observation of him at a hearing. *See* Petition at 10-11. Since the trial court did not have that opportunity, it is impossible to assess *post hoc* what impact his appearance might have had. Stated otherwise, the nature of the right asserted by petitioner is inherently incompatible with a determination that its denial worked no prejudice.

In addition, petitioner's right to be present at the hearing in order to consult with and assist his counsel is equally inconsistent with a harmless error claim. As *Chapman*, itself, acknowledged, certain constitutional deprivations "can never be treated as harmless error." 386 U.S. at 23. Among them is the right to assistance of counsel. *Id.*, footnote 8. Moreover, that principle applies not simply to the right to have counsel, as such, but to the effective assistance of such counsel (*United States v. Cronic*, 466 U.S. 648, 653-57 (1984)), including, specifically, the ability to consult throughout the proceedings. *See, e.g., Geders v. United States*, 425 U.S. 80 (1976); *Perry v. Leeke*, 488 U.S. 272 (1989).[2]

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[2] Petitioner, of course, recognizes that parental termination proceedings are not criminal. However this Court has observed that "the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982). *See* Petition at pp. 6-7. Thus, it would seem that analogous principles of constitutional harmless error should apply.

Under *Geders* and *Perry*, the right to effective assistance of counsel requires a client to have the ability to work with his or her attorney without impairment throughout the trial. The only limitation on that right which this Court has recognized is during a brief recess *while the defendant is actually on the stand. Perry, supra.* That isolated limitation – which is premised on concerns about the effect of consultation on the defendant's testimony – stands in sharp contrast with the procedures approved by the State of Oregon here, which relegated Stevens to occasional after-hours phone conversations with his attorney.

Moreover, the error resulting from Stevens' absence is not of a type that can be determined to be harmless. Whether his absence had an impact upon the outcome of the hearing is not a matter that can be realistically assessed by a reviewing court. Unlike other types of errors which are, in effect, transparent from the record, the impact of Stevens' inability to consult contemporaneously with his counsel cannot meaningfully be evaluated – certainly not in a way that would permit a court to satisfy the *Chapman* standard of determining "beyond a reasonable doubt" that the deprivation resulted in no prejudice. *See* 386 U.S. at 24.[3]

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[3] In all events, the question of whether deprivation of the right to attend the proceedings and to testify in person can be harmless error is, itself, worthy of this Court's consideration.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, the petition should be granted.

Dated: February 11, 1991.

Respectfully submitted,

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